

MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1279

MALCOLM K. FLECHNER, WILLIAM J. BECKER,
HAROLD B. EHRLICH AND FLECHNER
BECKER ASSOCIATES,

Petitioners,

vs.

ROBERT ABRAHAMSON AND
MARJORIE ABRAHAMSON,

Respondents.

**MOTION OF INVESTMENT COUNSEL ASSOCIATION OF
AMERICA, INC. FOR LEAVE TO FILE A BRIEF AS
AMICUS CURIAE IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI, AND BRIEF IN
SUPPORT OF THE PETITION FOR A WRIT
OF CERTIORARI**

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April 7, 1978.

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**MOTION OF INVESTMENT COUNSEL ASSOCIATION
OF AMERICA, INC. FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI.**

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the Investment Counsel Association of America, Inc. ("ICAA") hereby moves for leave to file a brief as *amicus curiae* in support of the petition for writ of certiorari filed by petitioners, Malcolm K. Flechner *et al.* Counsel for respondents Robert Abrahamson and Marjorie Abrahamson declined to consent to the ICAA's filing of an amicus brief, on the basis that the timing of the request for consent was such that he would not have sufficient time to respond.

The ICAA was organized in 1937 as an association of those investment advisers engaged in rendering investment counsel services to clients. The 79 member firms constitute virtually all of the larger and many of the smaller firms registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940 ("Act") who are independent of the banking and brokerage industries and render continuous portfolio supervision and advice to clients on the basis of their individual needs and circumstances.

The ICAA has no interest in the essentially private aspects of the dispute. Its concern is with the creation of a new, undefined private right of action against investment advisers. The ICAA was an important participant in the hearings and negotiations that culminated in the industry draft that became the Act. It therefore feels that it is uniquely qualified to assist the Court in its review of the Act's legislative history.

The United States Court of Appeals for the Second Circuit recognized the "importance and novelty" (A78)¹ of its decision to imply a private right of action under the Act. That decision, arrived at over a vigorous dissent, should not stand without review. It affects an industry which the Securities and Exchange Commission recognizes has "substantial impact . . . on both the economy and the public investor. . . ."² The ICAA believes that the decision is premised on a misreading of the Act's legislative history.

1. References "A" are to pages of the Appendix to petition for writ of certiorari of petitioners Malcolm K. Fleschner, William J. Becker, Harold B. Ehrlich and Fleschner Becker Associates.

2. Statement of the Securities and Exchange Commission in Support of Proposed Amendments to the Investment Advisers Act of 1940, transmitted to Congress by Chairman Hills in December, 1975. (Legislation to Amend Investment Advisers Act of 1940 Proposed by the Securities and Exchange Commission, Investment Advisers Act Release No. 491 (December 15, 1975), [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,341).

The ICAA therefore respectfully prays that the Court grant this motion for leave to file its brief in support of the petition for writ of certiorari.

Respectfully submitted,

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MARJORIE ABRAHAMSON,

Respondents.

**BRIEF OF INVESTMENT COUNSEL ASSOCIATION OF
AMERICA, INC., AMICUS CURIAE, IN SUPPORT OF
THE PETITION FOR A WRIT OF CERTIORARI.**

This brief is submitted on behalf of the Investment Counsel Association of America, Inc. ("ICAA") as *amicus curiae* in support of the petition for writ of certiorari of Malcolm K. Fleschner, William J. Becker, Harold B. Ehrlich and Fleschner Becker Associates.

The ICAA was organized in 1937 as an association of those investment advisers engaged in rendering investment counsel services to clients. The 79 member firms of the ICAA constitute virtually all of the larger and many of the smaller firms registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940 ("Act") who are independent of the banking and brokerage industries and render

continuous portfolio supervision and advice to clients on the basis of their individual needs and circumstances.

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ARGUMENT.

When the Act became law in 1940, it made no provision for a private right of action. As the majority opinion below recognized,¹ there was no statement in the legislative history indicating that Congress even considered the question of a private action. The Act was viewed as fundamentally "a compulsory census."² Section 214 of the Act granted jurisdiction to the district courts to hear criminal prosecutions and "suits in equity to enjoin any violation of this subchapter"; it made no provision for "actions at law." Twenty years later, Congress amended the Act extensively, strengthening the SEC's enforcement powers.³ No change to § 214 was proposed⁴ and no change was made. In 1970 the Act was amended again; its companion statute, the

1. A23. References "A" are to pages of the Appendix to the petition for writ of certiorari.

2. *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. (1940) [hereinafter "Senate Hearings"]* at 48.

3. The following sections of the Act were amended in 1960: 202(a)(12), 202(a)(18), 203(c)(1)(f), 203(c)(2), 203(d), 203(e), 203(g), 204, 205, 206, 208 [caption], 208(c), 209(e), 210(b), 211(a), and 217. Three sections or subsections were added: 206(4), 208(d) and 222.

4. The SEC made "extensive proposals." S. REP. No. 1760, 86th Cong., 2d Sess. 2 (1960).

Investment Company Act, was also amended. While a carefully delimited express right of action against an investment adviser to a mutual fund was added to the Investment Company Act,⁵ no provision for jurisdiction over "actions at law" was added to the Act. Finally, in 1975 the SEC proposed that § 214 be amended to add "actions at law brought to enforce any liability or duty created by [the Act]"⁶ and hearings were held on that proposal.⁷ However, no change was made.

Thus, in contrast to all of the other federal securities acts,⁸ the Act has never provided for jurisdiction over "actions at law." At no time has Congress evidenced any intent that the Act should form the basis for such an action.

The history of the birth of the Act is equally compelling. Early drafts contained, either directly or by reference, language regarding "actions at law."⁹ These were opposed by the industry¹⁰ and negotiations between the industry and the SEC

5. Section 36(b), Investment Company Act.

6. Investment Advisers Act Release No. 491 (December 15, 1975), [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80, 341.

7. *Investment Advisers Act Amendments: Hearings on S. 2849 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976); Investment Advisers Act Amendments: Hearings on H.R. 13737 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976).*

8. Securities Act of 1933, Section 22, 15 U.S.C. § 77v; Securities Exchange Act of 1934, Section 27, 15 U.S.C. § 78aa; Public Utility Holding Company Act of 1935, Section 25, U.S.C. § 79y; Trust Indenture Act of 1939, Section 322, 15 U.S.C. § 77vvv; and Investment Company Act of 1940, Section 44, 15 U.S.C. § 80a-43.

9. See, e.g., S. 3580, 76th Cong., 3d Sess. 98 (introduced by Sen. Wagner on March 14, 1940); H. R. 8935, 76th Cong., 3d Sess. 98 (introduced by Cong. Lea on March 14, 1940).

10. *Investment Trusts and Investment Companies: Hearings on H. R. 10065 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 76th Cong., 3d Sess. (1940) [hereinafter "House Hearings"]* at 88-90, 92; *Senate Hearings* at 712-723, 737-54.

ensued.¹¹ The ICAA played an important role in those negotiations and in the drafting that followed. The result was an industry draft that had deleted any references to jurisdiction over "actions at law" or to "liability". With those deletions the draft became the Act:

"In connection with the investment advisers, I think that Robert Page who represented Scudder, Stevens & Clark . . . submitted a draft of the bill to us, which is the draft that is included in this new bill."¹²

In short, the history of the Act—both in its birth and development—demonstrates that Congress never intended to create a private right of action under the Act.

The Act reflects a deliberate Congressional balance of the interests of the investment advisory industry and the interests of its clients.¹³ That balance is destroyed in the Second Circuit's opinion that must,¹⁴ but cannot, find support in the Act's legislative history. In its place, the Second Circuit would create a "claim for relief without limitation" (A44), an undefined cause of action that the federal courts will have to fashion through countless lawsuits. This should not be permitted. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723 (1975).

11. *House Hearings* at 88-90, 92; S. REP. No. 1775, 76th Cong., 3d Sess. 21 (1940).

12. *Senate Hearings* at 1124.

13. S. REP. No. 1775, 76th Cong., 3d Sess. 20-21 (1940) (Remarks of Rep. Wolverton).

14. *Ernst & Ernst v. Hochfelder*, 96 S. Ct. 1375, 1389 (1976).

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari by Malcolm L. Fleschner, William M. Becker, Harold B. Ehrlich and Fleschner Becker Associates should be granted.

Respectfully submitted,

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